

Campaign-triggered mass collaboration in the EU's online consultations: the ISDS-in-TTIP case

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Abstract For EU institutions, public consultations represent a key tool for transparent and accountable policymaking. By means of e-participation tools, both the European Parliament and the European Commission aim to encourage multiple stakeholders to provide input on legislative processes in ways that go beyond traditional consultations, which are sometimes aimed exclusively at a small group of stakeholders. Online questionnaires are frequently used to give individual citizens, civil society organisations and other interest groups the opportunity to express their opinions. Although it is widely accepted that e-participation can improve the democratic legitimacy of EU policymaking, online consultations entail a number of democratic challenges. With the Commission's recent online public consultation on Investor–State Dispute Settlement in the Transatlantic Trade and Investment Partnership, the flaws of online participation have once again become a focus of political debates. As a result of new societal trends that favour 'low-effort, feel-good' political participation via the Internet, e-participation will remain a challenge for the EU as well as for political parties. This challenge will not be appropriately addressed by having a high degree of transparency about the consultative procedures alone. What is required is more effective multi-level communication of the proceedings of the consultation and of its results.

Keywords E-participation · Democratic legitimacy · Democratic representation · Online consultation · Civil society · Investor–State Dispute Settlement · Transatlantic Trade and Investment Partnership

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Introduction

Engagement, involvement and empowerment—these are the political buzzwords often linked to modern forms of participation via the Internet. For many citizens the Internet has emerged as an indispensable medium that provides powerful digital tools for learning, networking and communication. Since the Internet is open and transparent, it easily facilitates collaborative action in innumerable respects. As a result, Internet users generally benefit from shared information that is local, bottom-up and easily accessible worldwide. Because of these characteristics, many civil rights campaigners, political commentators and politicians have been calling for a stronger role for the Internet in formal politics and the formation of political opinion. According to their reasoning, e-participation—that is, a greater use of information and communication technologies (ICT) in governance and law-making—encourages more people to engage in political processes, helps to overcome prevailing democratic deficits and increases trust in politicians and governments.

Most EU member states already employ various e-participation tools, which help to facilitate public policymaking at local, regional and federal levels. E-voting tools, e-petitions, online stakeholder surveys and online public consultations are frequently applied to involve citizens in political decision-making. At the EU level, the European Commission and the European Parliament have incorporated similar tools to encourage citizen ownership and inclusion.

For EU institutions, online public consultations represent a key tool for transparent and accountable policymaking. By means of online questionnaires, both the European Parliament and the Commission aim to encourage multiple stakeholders to provide input on legislative processes in ways that go beyond traditional consultations, which are sometimes aimed exclusively at stakeholders. The EU explicitly aims to give ordinary citizens, civil society organisations and other organised interests the opportunity to express their opinions.

However, the Commission's (2014a) online public consultation on Investor-State Dispute Settlement (ISDS) has very clearly shown that this deliberative approach towards policymaking is prone to several problems related to democratic representation, accountability and issue-specific technical expertise. A few civil society organisations' forceful grass-roots Internet campaigns against the Transatlantic Trade and Investment Partnership (TTIP) and ISDS resulted in a distinctive regional asymmetry in the contributions made and a disproportionately high number of subjective opinions rather than fact-based reasoning. The vast majority of replies were made via collective submission. These replies do not display the characteristics needed for participation that is based on careful consideration of the issues involved. The consultation is characterised by the over-representation of a few campaign groups that forcefully promoted their views to their constituencies. This type of participation is not particularly deliberative since a small core group deliberates exclusively while the target constituency merely follows along.

Legitimacy, dialogue and debate: e-participation in the EU

In the late 1990s, the Commission and the European Council came up with several suggestions on how to apply advanced ICT in order to more actively engage citizens in legislative processes. In 2001 the Commission emphasised the need for EU institutions to reach out to citizens. It gradually moved towards both more transparent methods of communication and citizens' systematic involvement in decision-making processes (European Commission 2001). Until the late 1990s the understanding of openness and accountability had in fact been restricted to public access to Community documents.

Initial concepts focusing on e-participation emerged with the European Commission's White Paper *Reforming the Commission* (2000). In this paper the Commission recognises the need to consult in a timely fashion with all citizens at the early stages of the legislative process. The document paves the way for an 'e-Commission' that would exploit the benefits of new digital communication channels. This publication was followed by the implementation of the Europa Portal and Europe Direct Service, as the EU gradually moved towards interactive policy consultations using the Internet. In 2006, e-participation emerged as a priority for the EU (Tambouris et al. 2013). Against the backdrop of the failed ratification of the European Constitution Treaty in 2005, the EU started to promote e-participation channels in order to become a 'listening Commission' (European Commission 2005).

The 2009 Lisbon Treaty explicitly envisages an EU with a stronger role for national parliaments and a stronger voice for citizens. Article 11 of the Lisbon Treaty requires EU institutions to 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.' Accordingly, EU institutions are required to conduct 'open, transparent and regular dialogue with representative associations and civil society' and 'carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent'.

The most important Internet access point for the Commission's e-participation tools is Your Voice in Europe, which provides stakeholders with a single point of access for online consultations, discussions and forums. All directorate-generals are in charge of their specific online consultations, but they must adhere to a predefined set of common guidelines on how to facilitate a consultation process (European Commission 2014d). These standards give the EU's consultation framework an institutional recognition and integrate it into a network of European governance tools (Smith and Dalakiouridou 2009). According to these standards, the Commission is required to precisely outline the objectives of a specific consultation, the procedure of the consultation and the targeted audience.

Depending on the policy field, the Commission can invite either the general public, all stakeholder groups or specific target groups to participate in the consultation proceedings. For the ISDS online consultation, the Commission decided to ask all stakeholder groups including individual citizens and organised interest groups to participate. Prior to the consultation, however, a few civil



society organisations firmly voiced concerns, particularly in the (social) online media, about TTIP and ISDS.

Anti-TTIP Internet campaigning in Europe

In June 2013, EU member states unanimously asked the Commission to negotiate TTIP, a comprehensive trade and investment treaty with the US. Since the mid-1990s, several political initiatives have endeavoured to strengthen transatlantic relations (Schmucker and Braml [2007](#)). Accordingly, TTIP was initially welcomed by a large majority of European national parliaments and the media alike. But soon after the official launch of the negotiations, a few civil society organisations started to raise multifaceted concerns over TTIP. Most concerns emerged from the TTIP negotiators' decision to leave the European citizens uninformed about the negotiation agenda and interim outcomes.

Many observers were surprised that intense criticism of TTIP initially emerged in Germany. Germany's economy is by far one of the most trade-intensive in the world and thus heavily dependent on open markets and on the fair and equitable treatment of exporters and foreign investors. However, in Germany (and Austria) a few environmentalist and anti-globalisation groups started to wage a resolute battle against TTIP through the Internet, primarily on social media. These groups frequently voiced far-fetched speculations about the scope and the adverse consequences of the agreement.

Campact, a professional campaign group that was initially funded (in 2004) by advocates of the Association for the Taxation of Financial Transactions and Citizen's Action (Attac), started and coordinated a strong protest movement against TTIP in Germany. Campact had previously engaged in multi-year campaigns against genetically modified organisms (GMOs), fracking and national provisions concerning the retention of personal data. Thus, TTIP provided an excellent complement to the organisation's campaign portfolio. In autumn 2013, Campact forged an alliance that was primarily supported by agricultural organisations, environmental activists and civil rights campaign groups (FAZ [2015](#); TTIP Unfairhandelbar [2015](#)).

The protest against TTIP was primarily focused on the Internet. The campaign groups prepared TTIP-related information notes that were spread via paid Google advertisements, Facebook and Twitter. In addition, an online petition demanding a halt to the TTIP negotiations was forcefully promoted via Google advertisements and member organisations' websites and mailing lists. In May 2014, 715,000 signatures had been handed over to Martin Schulz, the German Social Democrat's top candidate for the 2014 elections to the European Parliament.

The protest groups engaged heavily in well-coordinated anti-TTIP campaigning via social media, which resulted in a distinct asymmetry in the debate. In the period July to December 2014, anti-TTIP groups' announcements in Germany amounted to 83 % of total online media reporting on average, rising to 93 % at peak times. Peak-time media reporting took place around the TTIP negotiation

rounds. Of all TTIP-related postings in the German online media, 85 % were originally authored and spread by anti-TTIP groups (Bauer 2015a).

Anti-TTIP campaigning had a strong impact on German citizens' views of TTIP. A Google Trends analysis conducted for the period July 2013 to February 2015 suggests that German (as well as Austrian) citizens' search interest in TTIP was 25 times higher than that of US citizens, and 14 times higher than that of French citizens (Bauer 2015b). And according to a November 2014 Eurobarometer survey, it was in Germany that support for TTIP was the lowest and aversion to TTIP the highest (Eurobarometer 2014).

Over time, the negative feeling towards TTIP spilled over to other European countries. In December 2013, several European civil society organisations followed an invitation from the Seattle to Brussels Network to form a Europe-wide coalition against TTIP (Attac 2015). This summit was followed by the German protest alliance's decision to begin coordinating the European protest movement Stop TTIP. Again, anti-TTIP communication was conducted primarily through the Internet.

An analysis of European online media shows that anti-TTIP groups strongly dominated the online media debate in Europe: 60 % of the online media coverage from June to November 2014 can be attributed to anti-TTIP groups. As far as the issues primarily addressed in the media are concerned, ISDS took by far the largest share in total online media coverage (roughly 40 %), followed by GMOs (13 %), transparency (10 %) and culture (10 %). Because of German protest groups' intense campaign activities, online media coverage of ISDS in Germany was roughly four times higher than in the US and France, and almost six times higher than in the UK (Bauer 2014). After the Commission refused to grant the Stop TTIP movement the status of a European Citizens' Initiative (European Commission 2014c), the movement launched an EU-wide online petition to stop TTIP negotiations. By March 2015, the petition had received roughly 1.6 million signatures (Stop TTIP 2015).

The European Commission's online public consultation on ISDS

From its outset, TTIP was designed to contain investor–state dispute clauses aiming to protect foreign investors from discrimination and unjustified intervention by national public authorities and legislators. With TTIP, the Commission (2014b) explicitly aimed to enhance existing regulations on ISDS, for example to reduce the risk of frivolous cases, to balance investment protection with sovereign countries' right to regulate and to improve global standards on investment protection (European Commission 2014b).

Although the objectives of the Commission had been made public, ISDS became the top concern addressed by anti-TTIP civil society groups. It was and still is frequently stated by campaign groups, as well as the media, that ISDS in TTIP constitutes an attack on democracy and the rule of law. It is noteworthy that these views have developed so much momentum, despite ISDS having



been a standard ingredient of international economic diplomacy for 50 years and been included in more than 3,000 bilateral investment treaties worldwide.

Anti-TTIP and anti-ISDS protests caused EU member states and the Commission to create a transparency initiative concerning ISDS. On 21 January 2014, the European Commission announced it would conduct a consultation on ISDS. Then Trade Commissioner Karel de Gucht stated, 'I know some people in Europe have genuine concerns about this part of the EU–US deal. Now I want them to have their say.' (European Commission [2014a](#)) The Commission explicitly aimed to achieve a proper balance between protecting investors and safeguarding the member states' right and ability to regulate in the public interest.

The consultation was launched on 27 March 2014 and closed on 13 July 2014. On 3 July 2014 the consultation website was temporarily unavailable because a large number of replies were loaded simultaneously into the database. Therefore, the Commission ([2015a](#)) decided to extend the consultation by one week. In total, 149,399 replies were received. To many observers the high number of replies came as a surprise. By comparison, a 2014 consultation on biodiversity and ecosystem services received 723 answers; a 2014 consultation on water reuse in the EU garnered 506; a 2014 consultation on the quality of drinking water, 5,908; and a 2014 consultation on geographical indication protection and non-agricultural products, 137 (European Commission [2015c](#)).

During the ISDS consultation, 97 % of all replies were submitted by a small number of campaign groups. The responses were often identical or at least very similar to one another. Prior to the consultation, a few anti-TTIP civil society organisations had set up easy-to-use online tools to facilitate participation in the consultation proceedings. According to Friends of the Earth Europe ([2015](#)), 131,352 responses were submitted through the online platforms of Friends of the Earth Europe, the Austrian Federal Chamber of Labour, the Munich Environmental Institute, 38 Degrees and SumOfUs.org.

Among the national groups, there were, notably, replies from well-connected British, German, Austrian, Belgian and French consumer and environmental organisations. As a direct consequence, a disproportionate number of replies were received from the UK, followed by Austria, Germany, France, Belgium, the Netherlands and Spain. Together, these seven countries accounted for 97 % of all replies. The Commission received only 3,589 individual citizens' submissions, which amounts to 2.4 % of all the replies received. The huge number of platform-triggered replies caused Trade Commissioner Karel de Gucht to call it 'an outright attack' (Järvinen [2015](#)).

Pathways for policymakers and political parties

The Commission's online consultation on ISDS reveals four core features that are critical for EU policymakers. First, the outcome of the consultation is characterised by a distinct regional asymmetry in the number of replies received from EU member states. Second, the replies show a distinct asymmetry between informed responses and subjective opinion. Third, a very small number of

organised and well-coordinated interest groups provided easy-to-access platforms encouraging low-effort mass collaboration. Fourth, the post-consultation media response has frequently been non-reflective and largely negative.

The outcome of the ISDS consultation does not reflect a representative 'European will' on the scale of the EU, although its general purpose was to aggregate national opinions in a way consistent with an EU-wide representative democracy. Instead, the nominal consultation outcome is heavily biased towards segmented publics. A few national campaign networks, which are concerned with specific objectives and interests rather than representative of national opinion, dominated the public debate over ISDS.

The logic of collective action suggests that small groups can easily act on shared objectives, while large groups do not engage collectively unless their members are motivated by individual gains (Olson 1971). Accordingly, the over-representation of a few activist networks must be put into perspective: their success is the consequence of the weak participation of non-affiliates. The weak representation of other stakeholders, however, is an implicit consequence of the special interests that are 'represented by the transnational militant networks [that] occupy the terrain by a massive capacity of mobilization' (Badouard 2010, 106).

Media reporting of the results of the ISDS consultation has often been unreflective and negligent. Although the Commission report (2015a) offers precise statistics and detailed information about individual contributions, the media paid little or no attention to democratic representativeness and the characteristics of the contributions made. Instead of addressing the highly obvious procedural problems, the media frequently referred to strong public opposition to ISDS. There might be a general tendency in the media towards patchy reporting, but in this case negative media reporting can be attributed to the Commission's communication strategy. In its initial press release, Trade Commissioner Cecilia Malmstrom's key message was that the 'consultation clearly shows that there is a huge scepticism against the ISDS instrument' (European Commission 2015b). Although the consultation results were immediately available to the public, the fundamental democratic flaws of the overall ISDS consultation process lacked public visibility.

Conclusion

It is essential that policymakers and political parties officially recognise and clearly communicate that the democratic benefits of consultation tools are highly dependent on the public that uses them. In order to effectively communicate the benefits and flaws of future consultation procedures, improved communication between EU and national institutions is needed. To this end, the Commission should identify and proactively communicate the specific problems of a certain consultation procedure. It should then inform EU and national public servants according to established procedures prior to the official publication of the consultation results. The Commission should also liaise



with member states' parliaments, political parties and political foundations. This would help to broaden awareness of critical aspects among local opinion makers. Public authorities and political parties should also be encouraged to voice this information in modern online media. Such a process would require both new procedures and resources. But it would contribute to a more balanced and informed debate on complex policy issues, and it would help to shape public opinion in a more prudent and representative way.

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